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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 740

CHARLES THORNBERRY, Petitioner,

versus

BUCHANAN COUNTY COAL CORPORATION, Respondent.

RESPONSE.

JOE HOBSON,
Prestonsburg, Kentucky.
Attorney for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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CHARLES THORNBERRY, - - - - - *Petitioner,*

v.

BUCHANAN COUNTY COAL CORPORATION, - *Respondent.*

RESPONSE.

STATEMENT OF THE CASE.

Respondent accepts petitioner's statement of the case except in two respects:

(1) Contrary to the impression created by the petition, the deed in question executed by the petitioner conveyed broad mining rights to the respondent including among others the "right to remove all pillars, lateral and subjacent supports without leaving same to support the surface" and included a release of liability from damages. Such rights and the release were contained in petitioner's two source deeds (Joint Appendix, 12a-15a; 22a-26a) and petitioner's deed to respondent provided: "This conveyance includes all the mining rights, privileges and releases * * *" granted petitioner by the first of his two source deeds. The deed to respondent contained a provision that the mining rights were to be exercised so as not to "inter-

fere unnecessarily" with the mining of other seams but the conveyance further provided, "as a moving consideration for this sale", any mining in underlying seams were to be conducted so as to protect development of the single seam purchased by respondent (Appendix, 17a-18a). To this extent the "other seams" were servient to the dominant estate granted respondent.

(2) Petitioner's statement that respondent's mining in the seam it had purchased "destroyed" three seams of coal it had not purchased is not supported by the record. To the contrary, the trial court found there was no proof of probative value that respondent's mining in any way affected possible future mining of other coal. See. Appendix, 97a (oral opinion) and 105a (formal Findings of Fact).

ARGUMENT.

In both courts below, petitioner has contended the "unnecessary interference" clause in the deed to respondent imposed on respondent an obligation to conduct its mining in the seam covered by the grant in such a way that 40 or 50% of the coal would be left in pillars to support the overlying strata. Both the District Court and the Court of Appeals rejected such a construction, holding that, having purchased *all* the coal, respondent had the right to redeem it.

At the conclusion of petitioner's proof; the trial court, acting under Rule 41 (b), ruled that petitioner had shown no right to relief.

The basis of this ruling was that the deed explicitly conveyed *all* the coal in the Clintwood seam and, there being "no evidence that these people did more than conventionally mine this coal," there was a failure of proof of unnecessary interference with other seams.

This finding rests on "an inference drawn from undisputed facts and documentary evidence." Some of the courts of appeal on review of such decisions have felt free to draw their own conclusions and ultimate inferences. It has been said that "the authorities are indescribably confused" (2 B Barron and Holtzoff, Sec. 1132, p. 516), but the text of Rule 52(a), the Committee Note to that Rule and the decisions of this court make it abundantly clear that the "clearly erroneous" rule applies. *Commissioner* v. *Duberstein*, 1960, 363 U. S. 278, 80 S. Ct. 1190, 4 L. ed. 2d 1218; *U. S.* v. *U. S. Gypsum Co.*, 1948, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746. That the "clearly erroneous" rule applies as well to dismissals for insufficiency of evidence under Rule 41(b) is just as clear. [See Committee Note to Amended Subdivision (b), and Allred v. Sasser, 170 F. 2d 233 (7th Cir., 1948)]. That being so, this court must refuse to grant certiorari here, where in spite of an extravagant statement or two in the petition, review "would be of no importance save to the litigants themselves." *Rudolph* v. *U. S.*, 1962, 370 U. S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484, 486.

And especially should review be denied where both courts below have decided the question against petitioner. In *Comstock* v. *Institutional Investors*, 1948,

335 U. S. 211, 214, 68 S. Ct. 1454, 92 L. Ed. 1911, 1915, the court said:

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

Not only does the petition fail to show error—much less, "very exceptional" error—the "special and important" reasons for granting review required by Rule 19 of the Revised Rules of this court are likewise missing. Not much need be said in this regard. It should be said it is most difficult to see how our little damage case involving conventional deep mining can be part of "a scandal of national proportions," petitioner's reference being to "open-pit" or surface mining. Such argument has no bearing on the situation here.

And petitioner's accusation that the District Judge restrained petitioner from introducing evidence on damages and then ruled against him because he had not produced it is grossly inaccurate. On the trial the District Judge devoted the utmost effort to the impossible task of preventing petitioner's lack of technical knowledge from being a disadvantage to him in the presentation, pro se, of this case. After petitioner had announced through, respondent made its motion under Rule 41(b), specifying the ground, among others, that petitioner had failed to prove damages, if any he had. The trial judge thereupon gave petitioner the opportunity of presenting additional evidence but petitioner refused the offer (See Appendix, 93a).

CONCLUSION.

We submit that the District Court made a finding subject to the "clearly erroneous" rule. The Court of Appeals having affirmed, such a finding is final and cannot be drawn in question on certiorari here, the "special and important" reasons of Rule 19 being entirely absent.

The writ should be denied.

Respectfully submitted,

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Attorney for Respondent.